Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 78-5373

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WEEGAIL WASHINGTON,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The County Court At Law, No. 1,
Travis County, Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the County Court at Law No. 1 of Travis County, Texas, on the ground that the questions presented are so insubstantial that they do not warrant further argument.

OPINION BELOW

There is no opinion below, judgment of conviction having been entered upon a jury verdict.

JURISDICTION

Jurisdiction in this Court is proper under 28 U.S.C. §1257(2).

STATUTE INVOLVED

Section 38.02(a), Texas Penal Code, reads as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence and address to a peace officer who lawfully stopped him and requested the information. 1/

1/ The facial validity of this statute is also at issue in Zackary C. Brown v. State of Texas, No. 77-6673, a case in which this Court has noted probable jurisdiction.

QUESTIONS PRESENTED

Whether Section 38.02(a), Texas Penal Code, on its face: (a) violates the first amendment to the United States Constitution because it is overbroad and punishes silence; and (b) violates the fifth amendment's self-incrimination clause, applicable to the states through the fourteenth amendments's due process clause, because it imposes criminal sanctions upon those who choose to remain silent before they are arrested.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of conviction entered against Appellant Washington on June 16, 1978, in County Court at Law No. 1, Travis County, Texas, after trial before a jury.

About 10:00 p.m. on June 30, 1977, two experienced, uniformed police officers of the Austin Police Department were patrolling, in a marked patrol car, in a downtown section of Austin known to be a high crime area frequented by prostitutes. While stopped at a traffic light and heading south, the officers, who in accordance with instructions were generally familiar with the prostitutes in the area, observed a woman at the southeast corner of the intersection in front of a hardware store. From the officers' observation, the woman, whom they did not know, was behaving nervously, walking back and forth along the sidewalk near the curb and seemingly observing passing cars. She was dressed "revealingly" or "sharply" in a manner the officers associated with prostitutes. (See Exhibit A, attached).2/ The light changed, the officers proceeded slowly southward, and, as they slowed to a stop and looked back at the woman, she quickly turned and began to walk away from them around the corner.

2/ Exhibit A is a photocopy of a photograph introduced at trial. Testimony indicated that the photograph accurately depicted Appellant as she appeared at the time of arrest, except that she had been wearing a wig.

The officers, who now suspected that she was either a prostitute seeking customers or possibly a lookout for a burglary in progress in the hardware store, made a U-turn and drove back toward the woman. As they pulled alongside her in the patrol car, the car's driver leaned across to the passenger's window and asked her what her name was. She gave a non-responsive answer and continued walking. The officers stopped the car, got out, and approached her, with the driver asking her three more times what her name was. She refused to answer the question, whereupon she was arrested for a violation of Section 38.02 of the Texas Penal Code for failure to identify herself.

Appellant was tried before a jury in Municipal Court No. 1 and found guilty. She then sought and obtained a trial de novo in the county court at law, where a jury found her guilty, and the court assessed the punishment of a fine of $95.00 plus court costs. The county court at law being the highest court of the state in which a decision could be had under art. 4.03, Texas Code of Criminal Procedure, an appeal was taken directly to this Court pursuant to 28 U.S.C. Section 1257(2).

ARGUMENT

I.

The Case Should Be Dismissed For Failure To Raise A Substantial Federal Question

The insubstantiality of the questions presented on this appeal is apparent when two matters are considered. First, this statute does no more than make it a crime to totally refuse cooperation with a police officer who has lawfully stopped someone under standards already established by this Court in Terry v. Ohio, 392 U.S. 1 (1968). A predicate to prosecution under Section 38.02 is that the person charged must have been lawfully stopped, meaning that circumstances must have been present which gave the police officer an articulable, reasonable suspicion that a crime had just been

committed or was about to be committed. Terry's sanctioning of stops under such circumstances inevitably carries with it the idea that at least a rudimentary investigative inquiry, such as a request for the stopped person's name, conducted by the police officer may follow. Otherwise, without the ability to make such an elementary inquiry and expect an answer, a police officer has little reason to make the already sanctioned stop which has no other purpose than investigation, however cursory. Since this appeal presents an attack on the facial validity of the statute in question, the basic question becomes one not of the stop's lawfulness but of what can be required of the citizen after he has been stopped. At the least, the stop carries with it the idea that field interrogation may proceed within limits not nearly reached by the questioning in the instant case. This Court has held that "[a] brief stop of a suspicious individual, in order to determine his identity..., may be most reasonable in light of the facts known to the officer at the time." Adams v. Williams, 407 U.S. 143, 146 (1972) (emphasis added). See also United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).

The second matter suggesting the insubstantiality of the questions on this appeal is the absence of the onerousness typically associated with penalties for violation of a penal law. A violation of Section 38.02(a) is, under Section 38.02(b), a Class C misdemeanor which is punishable solely by a fine not to exceed $200.00. See Section 12.23, Texas Penal Code. Furthermore, since a conviction of a Class C misdemeanor imposes no legal disability or disadvantage, see Section 12.03(c), Texas Penal Code, Appellant has suffered no legal disability beyond the imposition of the $95.00 fine.

II.

The Questions Are Insubstantial In Light Of Prior Decisions By This Court

(a) Appellant argues that Section 38.02(a) is unconstitutional on its face because it punishes silence, thereby violating the first amendment. The premise of this argument is that Appellant's silence in the face of the officer's inquiries was a form of speech. Yet, Appellant has not cited a single case in which silence, without more, was labeled as speech. Appellee submits that there is no supporting authority for Appellant's position. At the most, only that silence which is justified as a principled refusal to support some state-supported religious, political, or moral idea can be labeled as "speech" which is protected under the first amendment. See, e.g., Wooley v. Maynard, __U.S.__, 97 S.Ct. 1428 (1977)(refusal to support an ideology arguably espoused by the state through a slogan printed on its automobile license plates). Appellant has not attempted to justify her silence as a principled refusal to support some state ideology.

There is good reason why no court has defined silence, without more, as speech. To define mere silence as speech would be a perversion of the English language and, perhaps more importantly, would undermine innumerable laws enacted to prevent this country's citizens from unscrupulous schemes and dangerous products. Issuers of stock could justify a refusal to provide the Securities and Exchange Commission with pertinent data as protected first amendment silence. Manufacturers of products such as drugs could support a refusal to provide consumers with information on dangerous side effects or on the proper use of the drug by reference to their first amendment right to silence. These and other absurd results flowing from Appellant's theory reveal the absurdity and poverty of the theory.

Even if Appellant's silence is somehow labeled as a form of expression, the state's interests in enforcing this statute and the state's criminal laws, as well as preventing crime, are sufficient justification for the statute. Cf. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

Appellant also argues that the statute is unconstitutional under the first amendment because it is overbroad. The language of the statute and prior authority of this Court make clear that the statute is drawn narrowly enough to pass constitutional muster.

To establish a statute's overbreadth, the party attacking the statute must establish that, however clearly and precisely a statute is drawn, it reaches and prohibits constitutionally protected conduct. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Even then, its deterrent effect on legitimate expression must be both real and substantial. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). Appellant has suggested no example of how Section 38.02(a) might reach protected first amendment activity, much less how its effect on that activity would be both real and substantial. The only example given by Appellant is her own, and this is not sufficient to establish an overbreadth attack on a state statute. Thus, application of the overbreadth doctrine, which in any event is to be employed only as a last resort in the context of ordinary criminal laws such as the one at issue here, see Broadrick, supra, is improper in this instance.[3/]

3/ Though Appellant adverts to a claim that Section 38.02(a) is unconstitutionally vague, this point does not appear to be seriously urged since Appellant admits the statute "lacks neither clarity nor precision." Appellant's Jurisdictional Statement, p. 5. The statute is not vague because, as a reading of it indicates, it is sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954).

(b) Appellant's argument that Section 38.02(a) violates the fifth amendment's self-incrimination clause because it punishes silence also lacks merit. In California v. Byers, 402 U.S. 424 (1971), this Court held that a requirement that a driver of a motor vehicle involved in an accident stop at the scene and give his name and address to law enforcement officers does not violate the privilege against compulsory self-incrimination:

> "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'"

Byers, supra at 429 (opinion of Burger, C.J.). The Court went on to note that there is nothing inherently incriminating about a person's name and address. 402 U.S. at 432. The force of this observation is even stronger when, as here, the statute is directed to the public at large and not to a highly selective group. In this sense, then, a person's name and address are analogous to blood samples in that they are neither testimonial nor communicative in nature and, therefore, do not implicate the privilege. See Schmerber v. California, 384 U.S. 757 (1966). See also United States v. Wade, 388 U.S. 218 (1967)(exhibition of a person at a post-indictment lineup) and Gilbert v. California, 388 U.S. 263 (1967)(handwriting exemplars).

Additionally, Appellant has not indicated how either the implications of the question or its context suggest that a responsive answer or an explanation of why it could not be answered might have been dangerous because injurious disclosure could have resulted. Yet, such is necessary before the privilege can be invoked successfully. Hoffman v. United States, 341 U.S. 479 (1951).

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which the cause depends are so insubstantial that no further argument is needed, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the County Court at Law No. 1 of Travis County, Texas.

Respectfully submitted,

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PROOF OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three true and correct copies of the above and foregoing Motion to Dismiss or Affirm has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, on this the 21st day of November, 1978, addressed as follows:

Mr. Don Gladden
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2814 Avenue D
Fort Worth, Texas 76105

Joe B. Dibrell

JOE B. DIBRELL, JR.
Assistant Attorney General

EXHIBIT A